IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 56755-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
MOHAMMAD H. SAKHI,	)	
	)	
Appellant.	)	FILED: September 25, 2006
	)	

PER CURIAM. Mohammad Sakhi appeals his conviction for second degree theft. He argues that the trial court erred when it failed to give a missing witness instruction and that prosecutorial misconduct deprived him of a fair trial. We disagree and affirm.

BACKGROUND

On September 22, 2004, Alan Duncan and Justin French, two loss prevention officers at a Mervyn's department store in Tukwila, apprehended Mohammad Sakhi for shoplifting. According to the guards, they watched Sakhi put two leather jackets and a purse into a Mervyn's shopping bag and walk out of the store without paying for the items. Sakhi first denied taking the merchandise, but ultimately signed a confession in Duncan and French's presence.

After completing an incident report, Duncan and French notified local police and waited with Sakhi. When an officer arrived, the men gave him a copy of their incident report and the price tags from the items. They showed the officer Sakhi's confession but did not give it to him. The officer took a picture of the department manager, Eunice Ray, holding the jackets, purse and shopping bag.

At trial, Duncan, French, and Ray testified. The police officer did not. The trial court denied Sakhi's request for a missing witness instruction related to the officer.

During her closing argument, defense counsel tried to weaken the impact of the loss prevention officers' testimony. She said, "[T]here is reason to doubt the credibility of both witnesses' testimony, Duncan and French." Report of Proceedings (RP) (July 14, 2005 Vol. 2) at 32. She continued by highlighting testimony she viewed as inconsistent and reminded the jury that loss prevention officers at Mervyn's are subject to discipline for unwarranted apprehensions. In response, the prosecutor began her closing argument by saying that the defense characterized the State's witnesses as liars. Defense counsel did not object to the prosecutor's statement.

The jury convicted Sakhi of second degree theft. He appeals the conviction, arguing that the trial court erred when it failed to give the jury a missing witness instruction and that the prosecutor's statement was prejudicial misconduct.

DISCUSSION

Missing Witness Instruction

We review the propriety of jury instructions de novo. In re Det. of Halgren, 156 Wn.2d 795, 803, 132 P.3d 714 (2006). If a party has control over evidence that would properly be part of a case, and the party has a natural interest in producing the evidence but inexplicably fails to do so, the jury may infer that the evidence would be unfavorable to that party. State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968). When the missing witness rule applies, the trial court should instruct the jury that they may draw an unfavorable inference against the party failing to call the witness. Id. at 281. Failure to give a warranted missing witness instruction is reversible error. Id. at 280–81.

A negative inference from a failure to call a witness arises only when the witness is "particularly available" to a party and the witness's testimony would be important and necessary to that party's case. Id. at 276–78. The opposing party must therefore establish a reasonable probability that the other party would not knowingly fail to call the witness unless the testimony would be damaging. Id. at 280. No inference is permitted if a witness's absence can be explained. State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991).

Sakhi disputed the value of the jackets and purse, which was relevant to the degree of theft. He argued that because the items were on sale, prices lower than those Ray wrote on the tags would have appeared at the register. He contends the police officer's testimony about the chain of custody of the price tags is of the utmost importance to establishing value. We disagree.

On the day of the incident, Eunice Ray, a department manager at Mervyn's,

wrote the value of the items on the remaining part of the tag (the part with the price had been torn off), and then dated and initialed the tags. The tags were then given to the officer. At trial, Ray testified the price tags the State offered as evidence were the ones she had dated and initialed, and the trial court properly admitted the tags as evidence.[1] The police officer would have had no first-hand knowledge about whether the items were on sale or whether Ray wrote correct prices on the tag. He could testify only as to whether the tags were the ones Ray gave him. This testimony would have had no bearing on the actual value of the items, and would have been cumulative of Ray's testimony.

Nor has Sakhi established a reasonable probability that the officer's testimony would be damaging. The State offered the three witnesses with greatest knowledge of the incident to testify. During pretrial motions, the prosecutor said the officer's "involvement in this case is extremely minimal. This is a shoplifting incident where the officer came in after [Sakhi] was detained by these loss prevention officers. He was mirandized. Did not answer any questions of the officer. Was processed and then released." RP (July 11, 2005) at 40. Sakhi offers nothing to suggest the officer's testimony would have weakened the State's case against him.

The trial court did not err when it denied Sakhi's request for a missing witness instruction.

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[1] A trial court may admit an exhibit with unique and readily identifiable characteristics if a witness with first-hand knowledge testifies that it is the identical object and in the same condition as of the time of the occurrence. State v. Russell, 70 Wn.2d 552, 553, 424 P.2d 639 (1967).

Prosecutorial Misconduct

A claim of prosecutorial misconduct requires the defendant to show that the conduct was both improper and prejudicial. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). If no objection is made at trial, any error is deemed waived unless the conduct is so flagrant and ill-intentioned that it causes an "'enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting Brown, 132 Wn.2d at 529).

Loss prevention officer French had testified that he could be fired for making unwarranted stops of store patrons. In her closing argument, defense counsel stated:

> There are reasons to doubt in this case. One thing you look at is the credibility of witnesses. In this case, there is reason to doubt the credibility of both witnesses' testimony, Duncan and French. Duncan said he didn't remember what his income was last year.
>
> He first denied that there was any closed-circuit tape-recording of the event at all. But then, when confronted with his own report where he indicated there was a tape, that it was not retained, then he switched . . . .
>
> . . . .
>
> And as to motive to make the report up in the right way, to testify in the right way, well, these security guards, these loss prevention officers have a huge motive to—a huge motive not to be accused of a bad stop . . . . If they mess up once, they get a warning. Second time, they get terminated.

RP (July 14, 2005 Vol. 2) at 32–33, 44–45.

The State responded:

> Well, according to [defense counsel], apparently there was no

> theft. These loss prevention officers, for some reason, got together, made the decision to set this poor guy up, lied in their statements, lied to the police, somehow got a third employee involved in their lies, took the stand and lied to you under oath.

Id. at 52.

Sakhi contends this argument is similar to those in which the prosecutor tells the jurors that in order to acquit, they must find that the State's witnesses lied. Such an argument is indeed improper. State v. Barrow, 60 Wn. App. 869, 875, 809 P.2d 209 (1991). But this situation is the inverse. Defense counsel asserted the State's witnesses were liars when she argued they made up their report to avoid being disciplined. This was a direct allegation of false testimony, to which the State was entitled to respond. There was no misconduct.

Affirmed.

FOR THE COURT